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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, *et al.*,

Appellants,

against

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF APPELLEE

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INDEX

PAGE

Statement 1

Analysis of Appellants' Statement of the Record 5

Summary of Argument 14

POINT I—Appellants did not rebut the presumption of constitutionality which attends the subject ordinance. There is a total lack of proof tending to prove the regulations adopted to be unreasonable or confiscatory. Moreover, even as altered by appellants' brief, the record fails to establish an unconstitutional "taking" 15

POINT II—The judgment in an earlier action on the appellee Town's zoning ordinance is not unconstitutionally impaired by the judgment below. The subject matter of the two actions and the rights they affect are totally different 25

POINT III—The defense of *ex post facto* is inappropriate to this civil action. In any event because of Ordinance No. 16's "separability" provision there is no present occasion to pass on the question. The ordinance does not amount to a bill of attainder 28

Concluding Comment 29

Conclusion 30

TABLE OF AUTHORITIES

Cases:

Arverne Bay Construction Co. v. Thatcher, 278 N. Y. 222 ..... 8, 23

PAGE

Bankers Trust Co. v. Blodgett, 260 U. S. 647 28
Borden's Farm Products Co., Inc. v. Baldwin, 293 U. S. 194 16

Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U. S. 210 29
The City of Rochester v. West, 164 N. Y. 510 20
City of Yonkers v. Rentways, Inc., 304 N. Y. 499 .... 8, 24

Defiance Milk Products Co. v. Du Mond, 309 N. Y. 537 17
DeVeau v. Braisted, 363 U. S. 144 29

Flemming v. Nestor, 363 U. S. 603 29

Hadacheck v. Sebastian, 239 U. S. 394 24
Harbison v. City of Buffalo, 4 N. Y. 2d 553 .....14, 22

Kentucky Whip & Collar Co. v. Illinois C. R. Co., 299 U. S. 334 23
Krantz v. Town of Amherst, 192 Misc. 912, Sup. Ct., N. Y., Erie Co. 18

Matter of L'Hommedieu v. Board of Regents, 276 A. D. 494, aff'd 301 N. Y. 476 28
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 ... 17
Lizza & Sons, Inc. et al. v. Town of Hempstead, 69 N.Y.S. 2d 296, aff'd 272 A. D. 921, 71 N.Y.S. 2d 14 18

Mugler v. Kansas, 123 U. S. 623 .....14, 24

New York Trap Rock Corp. v. Town of Clarkstown, Rockland County, 1 A. D. 2d 890 17

Ohio Tax Cases, 232 U. S. 576 28
Olsen v. Nebraska, 313 U. S. 236 16

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 20
People v. Calvar Corporation, 286 N. Y. 419 18
People v. Gerus, 69 N.Y.S. 2d 283, Nassau Co. Ct., N. Y. 2, 18, 19, 24
People v. Lathrop, 3 N. Y. 2d 551 29
People v. Miller, 304 N. Y. 105 .....14, 22

PAGE

People v. Sessano, 176 Misc. 723, Ct. of Spec. Sessions, N. Y. City 18
Phoenix Ry. Co. v. Geary, 239 U. S. 277 28
Pierce Oil Corp. v. City of Hope, 248 U. S. 498 ..... 6, 14, 17, 24
Post Brick Co., Inc. v. Thompson, 68 N.Y.S. 2d 159, Sup. Ct., N. Y. Nassau County 14, 17, 18, 19, 24
Powell v. Pennsylvania, 127 U. S. 678 .....14, 24

Queenside Hills Realty Co., Inc. v. Saxl, 328 U. S. 80 21

Reinman v. City of Little Rock, 237 U. S. 171 .....14, 24

Shepard v. Town of Skaneateles, 300 N. Y. 115 17
Sonzinsky v. U. S., 300 U. S. 506, 512 29

Matter of Stubbe v. Adamson, 220 N. Y. 459, 469 ... 16

Town of Huntington v. Board Hollow Estates, Inc., 138 N.Y.L.J. #55 Sept. 17, 1957, pp. 11-12, Sup. Ct., N. Y. Nassau Co. Ct., 172 N.Y.S. 2d 543 .....14, 18, 19, 24
Town of North Hempstead v. Colonial Sand & Gravel Co., Inc., 14 Misc.2d 727, Sup. Ct., N. Y. Nassau Co. 12, 18
Town of Somers v. Camarco, 308 N. Y. 537 14
Town of Southport v. Ross, 284 A. D. 598 20

U. S. v. Carolene Products Co., 304 U. S. 144 .....16, 17
U. S. v. Central Eureka Mining Co., 357 U. S. 155 ...14, 24

Wiggins v. Town of Somers, 4 N. Y. 2d 215 16
Matter of Wulfsohn v. Burden, 241 N. Y. 288, 298..16, 17, 18

OTHER AUTHORITIES

41 Col. Law Review, 457 24
44 Corn. Law Quart., 450 24
102 U. of Pa. Law Review, 93 24
1951 Wis. Law Review, 685 24

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BRIEF OF APPELLEE

Statement

This case involves an ordinance of the Town of Hempstead on Long Island in New York State and the application of that ordinance to appellants' sand and gravel pit. That pit is now a sprawling 20-acre crater containing a man-made lake formed by the mining operation. It lies in a 38-acre tract owned by appellant, Herbert W. Goldblatt, and devoted to sand and gravel mining by appellant Builders Sand and Gravel Corp.

Ordinance No. 16 was adopted by the Town of Hempstead in 1945 when all the Towns of Nassau County in New York adopted similar ordinances to curtail—in the language of Ordinance No. 16—"the danger to health and life caused by deep excavations remaining in the ground"

(Pltf's. Ex. 1; R. 22; pp. 6-9 of R.). Before the enactment of the 1945 ordinance the courts in a number of reported cases had freely noted the peril that lurks in these pits and the lives that had been lost in them. Pits like the one here in question had been held to be "nuisances". (See e.g., *Post Brick Co., Inc.* v. *Thompson*, 68 N.Y.S. 2d 159, 161 (Sup. Ct., Nassau Co.) (not officially reported); *People* v. *Gerus*, 69 N.Y.S. 2d 283, 291 (Co. Ct., Nassau Co.) (not officially reported).) The danger has continued to attract the attention of the courts in more recent years. (See e.g. *Town of Huntington* v. *Broad Hollow Estates, Inc.*, 138 N.Y.L.J. # 55, Sept. 17, 1957, pages 11-12 (Sup. Ct., Nassau Co.), aff'd without opinion 172 N.Y.S. 2d 543 (not otherwise reported).)

Ordinance No. 16 is not a zoning ordinance; it does not prohibit sandpits or even excavations. Sandpits may operate under its provisions but that use is controlled by certain minimal safety regulations. The ordinance prescribes, among other things, setback requirements, degree of bank slope, fence and retaining wall provisions. These provisions, as the Trial Court noted in its opinion "are clearly suited for the curtailment of obvious dangers" (R. 183); they operate to prevent cave-ins, falls and unsettling of properties neighboring on sandpits. By virtue of an amendment, the ordinance provides that no pit excavation may penetrate the water table at the site. This provision was designed to eliminate the danger of children drowning in huge artificial lakes like the one here involved. The provision was inspired by the commonly known appalling statistics of children's drownings in such pits. It was also intended to protect against possible pollution of the local water supply, a problem which has grown steadily in the past several years.

By this action the appellee Town sought to apply its duly adopted regulatory ordinance to appellants' huge excava-

tion. The Town proved at the trial each specification of its complaint. It was established that this sandpit occupies slightly more than half the area of the 38-acre tract owned and operated by appellants. Plaintiff's Exhibit 2 at the trial, a large aerial photograph, is a picture of the pit and the surrounding residential area (R. 24). The pit itself is filled with water to an average depth of about 25 feet. In some places the water is as deep as 48 feet (Pltf's. Ex. 3, R. 36). The formation of this lake has resulted from excavation by appellants beyond the maximum level now permitted by Ordinance No. 16 (R. 49-54). Although a small body of water was first formed by appellants' excavations some 30 years ago, this water-filled crater became progressively larger and deeper with the continuance of the operation until finally it formed the present 20 acre lake.

The pit lies in the midst of a densely populated area where children and schools abound. There are approximately 2,200 homes within a 3,000 feet radius of the center of the sandpit with an estimated population of 8,800 people (Pltf's. Ex. 2, R. 24). Four public schools are located within a radius of 3,500 feet; their enrollment is about 4,500 children. Within 1,500 feet there is situate a church where each day about 700 students (or each week about 3,500 students) receive religious instruction (R. 24; 27-35).

There is no dispute over the fact that the pit flagrantly violates a number of the ordinance's more substantial proscriptions: (a) in many places the excavation commences within 20 feet of the adjoining property line; (b) in certain places the pit excavation is more than 10 feet below the established grade of the nearest public street, and the incline of the sidewalls is more than 2 horizontal feet to 1 vertical foot without the support of retaining walls; (c) there is no concrete curb beneath the fence which encloses the premises and (d) appellants' excava-

tion goes far beyond the maximum depths allowed by the ordinance, thus penetrating the water table creating the described huge, artificial lake (R. 35-41; Pltf's. Ex. 3, R. 36; Pltf's. Ex. 4; R. 36; R. 41-44).

The tack taken by appellants on the trial should be noted here. At that time appellants were not represented by the attorneys who now make their appeal. With the change of attorneys there has been a marked change in legal argument. At the trial, appellants conceded their violation of the ordinance and devoted almost their entire case to the thesis that this ordinance and its enforcement were unjustifiably discriminatory and violative of the equal protection clause. Eleven separate examinations before trial, all directed to the attempt to make out that defense, were conducted, and the great bulk of the testimony offered on the trial was to the same end. The balance of appellants' testimony was offered to prove that another judgment in an action brought under an entirely different ordinance was *res judicata*. Little, if any, of the testimony offered was designed to put in issue the reasonableness of the ordinance's provisions or their fitness to serve the salutary purposes for which they were intended. Nor was any real attempt made to [illegible] any of the factual hypotheses which underlie their principal argument of confiscation.

In a lengthy and comprehensive opinion (R. 177-188) the Trial Court considered and specifically rejected each of the arguments made by appellants. With regard to the confiscation argument, which in the metamorphosis that has ensued since the entry of appellants' latest counsel is now the appellants' principal contention, the Trial Court pointed out that there had been a total failure of proof on all of the essential ingredients of that argument (R. 183). The Trial Court pointed out that the burden of proof and the burden of coming forth with evidence lay with appellants. It was not for the Town to prove justification for

its ordinance in the first instance; that was presumed. The law placed the burden of the attack upon the appellants and they had failed totally to satisfy that burden (R. 182). This factual disposition was unanimously affirmed by the Appellate Division of the Supreme Court (R. 193-195) and affirmed again by the Court of Appeals in the order from which this appeal is taken (R. 207-209).

Appellants' present counsel entered the case upon the appeal in the Court of Appeals. For the most part, their legal argument in that court was based on traditional constitutional generalizations that simply had no application to the case as it appears in this record. Unable to find an argument to fit the case, counsel instead decided to attempt to make the case fit the argument and proceeded in its brief to interpolate into the record a series of major factual premises. The dissenting judges in the Court of Appeals were content to accept the version of the record proof given in appellants' brief—indeed this is apparent from the dissenting opinion—and upon that newly spun version of the facts rendered an opinion that declared the subject ordinance unconstitutional. The majority of the Court of Appeals limited itself to the record before the Court and was led to the conclusion that the ordinance was constitutional. Because appellants rely so heavily upon the dissenting opinion below, the factual and conceptual inaccuracies and errors that led to that opinion (which also form the substructure of appellants' arguments in this Court) are set out now at the outset of this brief.

Analysis of Appellants' Statement of the Record

Throughout the argument in the Court of Appeals and now in this Court appellants have repeatedly asserted that there was no nuisance, no existing evil and no danger at their pit. They couple this misstatement with the decep-

tive one that the respondent Town failed to prove their operation a nuisance or a hazard.

This latter statement is deceptive because by plain implication it would put upon the respondent Town a burden of proof it simply did not have. Later in this brief appellee refers to some of the familiar cases which point out that the law presumes in the first instance the reasonableness of the ordinance and the existence of the evil sought to be corrected. The burden is then upon the assailant to establish that the ordinance is unreasonable. As the Trial Court specifically found, and as all the appellate courts below have held, appellants simply failed to adduce the proof necessary to bear their burden. Additionally, this statement is deceptive because it ignores the unquestionable public experience, the available public records and the common knowledge to which the courts in the opinions cited earlier in this brief made ready reference. There is no question about the propriety of considering these factors in judging this ordinance (See e.g. *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498).

In both the Appellate Division and the Court of Appeals below appellants stated flatly that there had been no loss of life or property at the pit. This fact, even if true, would not of course have been a determinative one and the Trial Court so held (R. 183). But the offensive aspect of the statement was that it was unsupported by the record and indeed contrary to actual fact. Appellee had obtained from the Nassau County Police Department the statistics of drownings in pits like the subject one but because of the total failure of proof by appellants on the trial decided that it was unnecessary to offer them. It was not until appellants repeated their misstatement in the Court of Appeals that appellee felt obliged to request the Court to take judicial notice of the statistics and in particular of the drowning of a child in the very pit in question in 1944 (See R. 206). It does not affirmatively appear that the majority

took note of this particular event and, of course, whether it did or did not is inconsequential since—concededly—the occurrence of one single event in the pit in question would not necessarily be decisive. But the drowning incident was introduced in order to point up the lengths to which appellants have gone in an attempt to supply for their legal contentions the factual bases which are so evidently lacking in the actual record.

Another of the principal props of appellants' contentions in this Court is the asserted fact that the judgment below, in effect, totally and absolutely prohibits appellants' operations and leaves their land valueless. The proposition is completely without factual support. Self-evidently neither the ordinance nor the judgment, as Judge Burke noted below (R. 200), proscribes all future excavations at the site. Indeed, some 18 acres of land remain which have not yet been excavated and are still available for whatever sand they might contain. Appellants' gratuitous suggestion that these 18 acres are needed for processing and the dissenting opinion's observation that the photographs show this area "to be entirely occupied by the machinery used in the operation of the sand and gravel pit" (R. 205-206) are simply inaccurate and have been rejected, as matters of fact, by all the courts below. The photographs speak for themselves and reference to the topographical survey (Pltf's. Ex. 3, R. 36) and arithmetical computation from the figures supplied there would indicate that some 110,000 cubic yards of earth can still be mined in conformity with the ordinance in the unexcavated portion of the tract.

The flat statement in the dissenting opinion that the cost of refilling the existing excavation is in excess of $1,000,000 (R. 203) is another interpolation. No evidence to that effect was introduced at the trial. The figure was mentioned for the first time in the Court of Appeals by appellants' counsel. It was borrowed by the dissent, intact and without apparent challenge, from appellants' brief in the Court of Appeals.

Moreover, there is nothing in the record to show that this 38 acre tract—about one-half of which is taken up with the pit—might not have some other valuable use even if unavailable for sand or gravel mining. Appellants continue to evade this issue by suggesting that it was the Town's burden to establish that there is another valuable use. The contrary is clearly the law; the burden of proof lay with the appellants. If the appellants would rely on a claim that their property has been rendered useless, they and not the Town must offer proof establishing uselessness. This they did not even attempt to do. Their failure to eliminate the possibility of another valuable use for the land obliges the Court to the contrary assumption (See *City of Yonkers* v. *Rentways, Inc.*, 304 N. Y. 499, 505; *Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222, 232).

The argument based upon the alleged prohibition and total deprivation of a substantial and potentially profitable use has an additional fundamental debility. It rests, of course, upon the assumption that the right to continue dredging was a valuable one. But it was nowhere established that there remained any sand or aggregate that could be profitably mined in the present water-filled excavation where further dredging has been enjoined![1] Appellants' counsel are aware of this critical failure of proof and have strained to draw helpful inferences out of the meagre proof available to them in the record. Thus, they attempt to argue that since they mined sand prior to enforcement of the ordinance it must be presumed that they could have continued to mine sand profitably! Surely no presumption of continuance is appropriate in this case. Indeed, if inferences are to be drawn they must militate

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[1]None of the exhibits indicates whether there is anything to be mined under the water-filled portion of the tract. The fact that varying depths are indicated in the topographical survey, as pointed out by appellants, is inconclusive. Those maximum depths very likely were established as a result of exhaustion at given points in the pit.

against the possible existence of substantial deposits under the already excavated part of the 38 acre tract. Concededly, this excavation had been continuously mined for some thirty years prior to the subject ordinance. Each year of excavation brought this depleting asset closer to the point of practical economic exhaustion. On this record, that point might very well have been reached at or about the time the instant injunction became effective. Certainly, it is clear that the onus of proving otherwise lay with the appellants and not with the appellee Town. They failed in this regard; there is no proof that there was something left underwater which could be profitably mined.

Appellants' failure to prove that there remained something of value yet to be mined in the subterranean portion of their tract renders irrelevant the extent of their investment in the business. But even if the subject were relevant, it would merely present another contention for which appellants can produce no factual support in the record. The only evidence as to value of the investment which the record contains is the testimony that the assessed valuation of this tract was $66,000. From all that appears, however, that value is allocable to the 18 acres left undisturbed by the judgment and consequently tends in no way to confirm appellants' present contention that their property has been rendered valueless.

Appellants, in an implicit concession of their total failure of proof on this issue, seek to supply, by reference to the record of one of the previous trials between these parties, evidence as to the value of their operation. Appellants point to testimony on the trial of the zoning ordinance case in 1956 (Aplts.' Br., pp. 21-22). That testimony, however, was never introduced as evidence on the question of value and cannot be considered on that question here. Its admissibility was specifically limited to the question of *res judicata*, a defense which has been, formally at least, abandoned. Thus, in accepting the transcript of the testi-

mony in the zoning ordinance case, the Trial Court stated that ". . . It is only allowable on affirmative defense number one, res judicata. Otherwise it is pure hearsay" (R. 124-125; R. 96-97; see Richardson on Evidence, 8th Ed. §§ 275-286).

This disregard of the facts and record is continued at another point in appellants' brief (p. 21) where they make the bland assertion that the Trial Court refused to permit evidence of the value of appellants' land and investment. This is another inaccuracy which the dissenters in the Court of Appeals appear to have accepted without challenge (R. 204). Appellants have reference to a single question deemed improper by the Trial Court. On the direct examination of Mr. Goldblatt, he was asked what the approximate value of his structures and equipment was (R. 119). No foundation had been laid; there was no evidence as to the nature of these structures or equipment and, most importantly, there was no evidence that the value of these structures and equipment, whatever that value might have been, would be affected by the judgment. Under the circumstances, the inquiry was not shown to be material and the objection was sustained. The very next question, which was confined to the land upon which the excavation was made, the Trial Court deemed appropriate (R. 119).

There are other factually inaccurate premises in the substructure of appellants' argument in this Court. In the Court of Appeals, appellants had contended that their pit was in total conformity with Ordinance No. 16 as adopted in 1945 and before the amendment adding the water table provision. Appellee responded by flatly denying that assertion and by pointing out to the Court that no folio citations had been offered to support it. Certainly, the Town did not concede any such fact. Despite this, however, Judge Van Voorhis in the Court below repeated appellants' statement in his dissenting opinion

in these words ". . . The gravel pit was operated in accordance with a 1945 ordinance and is admittedly in conformity therewith." Again in the Jurisdictional Statement submitted by appellants in this Court, the statement was repeated, this time with what appeared to be supporting reference to the record (Jurisdictional Statement at p. 5). In its motion to dismiss, however, appellee demonstrated that all of the folio references supplied by appellants pertain to the fence provision exclusively and that appellants had made no attempt to show that their pit complied with all the other provisions of the ordinance before its amendment (Motion to Dismiss, p. 8). Now, having twice been confronted with the inaccuracy of the contention, appellants repeat this false assertion (Aplts' Brief at p. 4) and this time without reference to *any* portion of the record!

At various places throughout their brief appellants suggest, as they did in the Court below, that it is the position of the Town and the sense of Ordinance No. 16 that the business of excavation of sand and gravel is *per se* evil and should be extinguished. Appellants point to the fact that in the United States, and more particularly in New York State, this industry is an extensive and an important one. Appellee readily concedes the accuracy of appellants' statistics (which were also made part of the dissenting opinion)[2] but rejects the implication as an absurd one. Ordinance No. 16, as even a superficial reading will show, recognized the fact that sandpit operations are not intrinsically evil. It does not prohibit all sandpits; it merely requires that they be maintained in conformity with certain minimal safety standards. There are today a number of operating sandpits in Nassau County, all the Towns of which have ordinances like plaintiff's Ordinance No. 16.

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[2]Appellee concedes that this Court may take judicial notice of these statistics just as it may take judicial notice of the statistics of drownings in Nassau County sandpits.

These sandpits can be and are operated in conformity with the provisions in the applicable ordinances. An apt and ready illustration is the Colonial Sand & Gravel pit involved in the case of *Town of North Hempstead* v. *Colonial Sand & Gravel Co., Inc.*, 14 Misc. 2d 727, 178 N.Y.S. 2d 579 (Sup. Ct., Nassau Co., Hogan, J.).

Another straw man argument raised by appellants for the first time in the Court of Appeals centers about a distorted analysis of the clear terms and simple meaning of the judgment (R. 12-14). This analysis results in the conclusion that the judgment requires them to refill the entire 20 acre excavation *whether or not* they propose to resume excavating. The judgment appealed from, however, contains no such provision; it provides only that excavating be terminated until the ordinance's regulations are satisfied. There is no separate affirmative mandate which operates without regard to the resumption of excavation operations. When appellee pointed this out below, appellants conceded that the judgment now entered did not contain an affirmative refill requirement by pointing out that their argument was actually made in anticipation of appellee's bringing a separate subsequent proceeding to require a refilling of the pit (Appellants' Reply Brief in the Court of Appeals at p. 10). At that point, the matter was clearly irrelevant to the case at bar. All of this notwithstanding, Judge Van Voorhis of the Court of Appeals treated this case as though it involves a mandatory judgment requiring refill by appellants.

One additional important misconception should be noted. In his opinion, Judge Van Voorhis stated that during the oral argument the attorney for the Town said that the Town does not contend that the pit in question amounts to a nuisance (R. 204). This single factor may very well have been a decisive consideration in Judge Van Voorhis' deliberations. Certain it is that the assumption is important to appellants' position as argued in this Court. But as a matter of fact the statement in the dissent is

not accurately descriptive of appellee's contention on oral argument. Whatever the cause of the misunderstanding, it should have been clear to the entire court, as it apparently was to the majority, that appellee made no such concession. Indeed, at every stage of the litigation, throughout a total of six written briefs or memoranda and argument in four different courts, appellee argued quite the contrary. It has been appellee's consistent position that whether or not the pit could be said to constitute a technical "nuisance" is not decisive and that, in either event, appellants have failed to bear the burden of proving the ordinance unreasonable. Equally consistent has been appellee's position that the pit with its numerous violations of the ordinance *does* in fact constitute such a nuisance. The Trial Court so held, in effect (R. 183-184) and was affirmed by both Appellate Courts. The argument was thus spelled out with simply clarity in appellee's brief in the Court of Appeals. "Pits like the subject one constitute such a public nuisance" (Appellee's "Respondent's Brief in the Court of Appeals" p. 33, also pp. 16-17; 38). This argument was acknowledged by appellants (Appellants' Reply Brief in the Court of Appeals, p. 19). That contention was repeated by appellee's counsel throughout his oral argument in the Court of Appeals and although appellants now eagerly subscribe to the "concession" described by Judge Van Voorhis, no mention of the alleged concession was made by their counsel in his reply argument before the Court of Appeals.

Thus, it should be clear that the position of the dissenters in the Court of Appeals, now taken by the appellants in this Court, is bottomed upon a series of factual hypotheses that have no place in the case at bar or, for that matter, in reality. When the case is limited to the facts in the record, the facts found and affirmed by all the courts below, the order appealed from is clearly supported by the cumulative impact of compellingly appropriate and well established decisional principles and must be affirmed. Those principles are briefly set out in the following pages.

Summary of Argument

(I). Ordinance No. 16 is attended by a presumption of constitutionality. This presumption is buttressed in the case at bar by the commonly known and judicially held menace to life and property posed by pits like the one in question. Appellants, upon whom the burden of proof lay, failed to rebut the presumption by adducing substantial evidence clearly establishing a lack of nexus between the ordinance's provisions and the objective it sought to achieve. This failure of proof was so extensive that it included even a failure to establish the loss of anything of substantial value.

A great deal of the difficulty with appellants' position arises out of their attempt to confuse the present ordinance with pure zoning ordinances like those involved in *People* v. *Miller* (304 N. Y. 105); *Town of Somers* v. *Camarco* (308 N. Y. 537); and *Harbison* v. *City of Buffalo* (4 N. Y. 2d 553). These ordinances differ with the present one as to both effect and objective. This ordinance is not an absolute prohibition but merely a regulatory enactment directed against a serious threat to public health and safety. Although it has not been proven here, even had appellants established an utter prohibition, Ordinance No. 16 would nonetheless be constitutional because of the seriousness of the evil against which it is directed (*Reinman* v. *City of Little Rock*, 237 U. S. 171; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498; *Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155; see also 41 Col. Law Review, 457, 459-467).

(II). The judgment in the 1956 action by the Town of Hempstead against appellants involved a separate and distinct ordinance, the Zoning Ordinance of the Town of Hempstead, and not Ordinance No. 16. Consequently, the rights declared in that judgment are not impaired by

the judgment in the present case. Since the rights affected by the present judgment cannot be said to have vested in the first judgment, there has been no unconstitutional deprivation of a "vested interest". Basically, the argument made by appellants in their Point II is indistinguishable from the argument made in the courts below under the title *"res judicata"*, which argument was rejected specifically by the Supreme Court of Nassau County in an earlier action on Ordinance No. 16.

(III). The defense of *ex post facto* is inappropriate here because this is a civil action which does not involve the penal aspects of Ordinance No. 16. Moreover, the existence of the "Separability" clause in Ordinance No. 16 makes it unnecessary to consider the question of *ex post facto* at this time. The argument that the ordinance is a bill of attainder, raised for the first time on this appeal, is also inappropriate.

POINT I

Appellants did not rebut the presumption of constitutionality which attends the subject ordinance. There is a total lack of proof tending to prove the regulations adopted to be unreasonable or confiscatory. Moreover, even as altered by appellants' brief, the record fails to establish an unconstitutional "taking".

In its broadest terms, the legal question here is whether Ordinance No. 16 of the Town of Hempstead as applied to the appellants, is a valid exercise of the Town's police power.

Unquestionably, appellee Town is—and was at the time of the adoption of the subject ordinance—empowered to enact and enforce, by injunction, ordinances regulating the operations of sand or gravel pits and "prohibiting the use

of any lands or other premises for the aforesaid purposes which do not comply with such regulations" (Town Law, §§ 130 (23); 136 (12); 135).

Ordinance No. 16 was passed pursuant to this authorization.

In their brief, appellants argue that Ordinance No. 16 is unconstitutional because, as to them, it is a totally prohibitory and confiscatory regulation. Not only is this argument completely vulnerable from a legal point of view, but as already shown it lacks vigor in view of the appellants' failure of proof on this issue.

The particular facts involved in litigation like this are indispensable to the determination of a constitutional question. Generalizations offer little help. (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393).

Appellants, in an effort to bridge the gap of absent evidence, have squarely tried to put the burden of proof on appellee. This is the bedrock of the agument in their brief challenging the validity of the ordinance. As framed by appellants, this position misconceives well-established law. Ordinance No. 16 comes before the Court attended by a weighty presumption of reasonableness and constitutionality. This presumption assumes the existence of necessary factual support for the enactment's provisions (*Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209, 210). If any state of facts, which are known or can be assumed, justifies the law, the Court's power of inquiry ends (*U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 154; *Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 298). Concededly, the ordinance must be related to some evil or threat to the community's welfare but that evil need only be reasonably apprehended (*Matter of Stubbe* v. *Adamson*, 220 N. Y. 459, 469; *Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219). Questions as to the wisdom, need or appropriateness of the enactment are for the legislative body (*Olsen* v. *Nebraska*, 313 U. S. 236, 246). Consequently, the onus of showing the lack of justification for the specific regulations adopted or

their unreasonableness, rests upon the party making the attack (*Shepard* v. *Village of Skaneateles*, 300 N. Y. 115, 118; *N. Y. Trap Rock Corp.* v. *Town of Clarkstown* (1 A. D. 2d 890, 149 N.Y.S. 2d 290 (2nd Dept.), aff'd w/o opinion 3 N. Y. 2d 844) and to satisfy it unconstitutionality must be demonstrated beyond a reasonable doubt (*Defiance Milk Products Co.* v. *Du Mond*, 309 N. Y. 537, 540-541; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79).

Certainly the evil here is, at the very least, "reasonably apprehended" (*Matter of Stubbe* v. *Adamson, supra*). The commonly known history of drownings and other accidents in pits like this one, speaks ominously but eloquently in justification of the provisions of Ordinance No. 16. Of course no court can close its eyes to such common knowledge in judging the propriety of a police power regulation like the subject one (See *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, 500; *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 154; *Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 298). It is particularly cogent in this case where the pit involved is in reality a huge sprawling crater, filled with water to an average depth of some 25 feet, forming a permanent artificial lake in a densely populated community abounding with thousands of children.[3]

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[3] Appellee has already noted that in the court below it asked that judicial notice be taken of the drowning of a child in the pit here in question. It also pointed out to the court the Nassau County Police statistics which reveal a long line of drownings in pits like the subject one. This proof was never introduced at the trial only because it was not needed; defendants (appellants here) had offered no proof sufficient to require further buttressing of the presumption of constitutionality. Certainly these statistics are entitled to at least the same consideration that this Court will give to the speech made by Honorable Douglas McKay (see Appellants' brief, p. 27) the 1959 statistics of the United States Bureau of Mines (Appellants' brief, p. 27); "the report" of projected condemnation proceedings against a Nassau County sandpit (Appellants' brief, p. 34); and the "current price" of fill (Appellants' brief, p. 35) all of which matters found their way into this case by way of Appellants' brief and not the record.

Other considerations, like the detrimental effect of this pit on property values in the neighborhood and aesthetics, although not by themselves conclusive, further evidence the reasonableness of this ordinance (See *Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 298; *Post Brick Co., Inc.* v. *Thompson, supra; People* v. *Gerus*, 69 N.Y.S. 2d 283, 291 (Co. Ct. Nassau Co., Johnson, J.) (not officially reported).

This is not a novel situation. Sandpit ordinances in material and substantial part identical or similar to the one at bar have frequently been before the courts. With exceptionless consistency, they have been upheld as reasonable exercises of the police power. *Town of North Hempstead* v. *Colonial Sand & Gravel Co., Inc.* (*supra*); *Town of Huntington* v. *Broad Hollow Estates, Inc., supra; People* v. *Gerus, supra; Lizza & Sons, Inc., et al.* v. *Town of Hempstead*, 69 N.Y.S. 2d 296, aff'd 272 App. Div. 921. 71 N.Y.S. 2d 14 (2nd Dep't); *People* v. *Sessano*, 176 Misc. 723, 29 N.Y.S. 2d 45 (Ct. of Special Sessions, N.Y.C. App. Part, 2nd Dep't); *Post Brick Co., Inc.* v. *Thompson, supra; Krantz* v. *Town of Amherst*, 192 Misc. 912, 80 N.Y.S. 2d 812 (Sup. Ct., Erie Co.); *People* v. *Calvar Corp.*, 286 N. Y. 419.

These cases illustrate vividly the nature of the problem dealt with by ordinances like the subject one and the complete propriety of the regulations they promulgate. The problem was described aptly in the *Broad Hollow* case, (*supra*). The ordinance there was similar to Ordinance No. 16. In declaring the law valid in its application against a sandpit the Court (Hooley, J.) said:

> "Without regulation many sand and gravel pits would become a menace to the public, would endanger the lives of young children and it is a matter of common knowledge that heretofore many lives of young children have been lost in these unguarded sandpits . . . The lack of regulation unless corrected will no doubt leave large tracts of land . . . blighted land-

scapes and barren wastes, vast excavations filled with water, and nuisances to the surrounding property because of sand and dust blown by the wind. Surrounding property will be depreciated in value by the lack of regulation and the general welfare, public safety and public health will tend to be preserved by the ordinance which is attacked in this litigation. The maintenance and preservation of property values and the happiness and prosperity of the people residing in the township will be promoted by the ordinance which is subject to attack here." *Town of Huntington* v. *Broad Hollow Estates, Inc., supra* at p. 12 of N.Y.L.J.) (Emphasis supplied.)

Almost twenty years earlier—before the dramatic population increases of Long Island—Mr. Justice Hallinan had already pointed out that pits like this one are serious hazards amounting to public nuisances. In the *Post Brick* case (*supra*), he held:

> "Of course, there can be no question, after examining the photographs of the excavations thus far made, that esthetically the surrounding property suffers as a result, but that is not the only damage which upon the evidence adduced at the trial, is likely to stem from such use. The deep excavations as demonstrated in the photographs, are filled with water, and on the face thereof constitute hazards which amount to public nuisances." (*Post Brick Co., Inc.* v. *Thompson*, 68 N.Y.S. 2d 159, 161) (emphasis supplied.)

This conclusion was echoed by Mr. Justice Cortland Johnson in the *Gerus* case (*People* v. *Gerus*, 69 N.Y.S. 2d 283, 291).

Viewed in the context of the problems and hazards that inspired Ordinance No. 16 the specific regulations it contains are on their face obviously suited for the curtailment and suppression of these dangers, as the Trial Court

specifically found. Thus, the requirements concerning setbacks, degree of slope, barricades, fences, lights, retaining walls and the maximum ground water level, all provide protection against the danger of cave-ins, falls, drownings and water pollution.

All these considerations of public safety, convenience, comfort and prosperity must be taken together when determining the propriety of police power regulations. When those considerations, as applicable here, are combined with the presumption of constitutionality, the irresistible conclusion is that the instant ordinance is in its terms reasonable.

The existence of the presumption of validity and the fact that the burden of proof lay with defendants is nowhere challenged in our law. Concededly, this presumption is not, in the first instance, a conclusive one; it is rebuttable by clear and convincing proof. Whether in a given case the presumption has been overcome is, in the words of Mr. Justice Holmes "a question of degree" (*Pennsylvania Coal Co.* v. *Mahon, supra*). The simple fact is that here appellants did *not* clearly establish—indeed offered no worthwhile proof to show—a lack of nexus between the plain hazard sought to be avoided and the protective measures selected by the Town's governing body.

The appellants' proof, all of it through Mr. Goldblatt, himself one of the appellants, was at best, sparse. Mr. Goldblatt testified that there had been no cave-in at the pit (R. 121). That circumstance is not determinative (see *City of Rochester* v. *West*, 164 N. Y. 510, 514; *Town of Southport* v. *Ross*, 284 App. Div. 598, 132 N.Y.S. 2d 390, 392 (3rd Dep't) (R. 183)). Mr. Goldblatt testified that the existing fence at the pit is inspected "about twice a week" (R. 84). Inspection at an excavation like this one on an approximate semi-weekly basis could hardly be said to be a substitute for the concrete curb require-

ment the Town Board prescribed as a safety measure to thwart precocious children from burrowing under the pit fence. Pit operators cannot find immunity from regulatory ordinances by selecting their own safety precautions. Otherwise, the administration of this ordinance would become hopelessly chaotic. Mr. Goldblatt testified that the slope at the pit at 45 degrees is stable. Surely his opinion of stability would not establish that the ordinance's requirement was oppressive or unreasonable. The extra precaution, if it be that, fixed in this ordinance must be viewed as an enactment of the Town Board designed first to preserve human life—the lives of those legally in the pit as well as trespassing children—and second to preserve neighboring property contiguous to the pit.

The appellants' challenge, directed as it is to the wisdom or to the reasonableness of Ordinance No. 16, is reminiscent of an unsuccessful challenge made by the owner of a lodging house in *Queenside Hills Realty Co., Inc.* v. *Saxl* (328 U. S. 80). In the *Saxl* case, an amendment to the Multiple Dwelling Law required the owner of a lodging house to install and maintain a sprinkler system. As in the case at bar, the owner in *Saxl* argued that its own precautions were more than adequate to meet the evil at which the statute was aimed. The owner argued that compliance with the statute would be economically devastating.

Mr. Justice Douglas responded to that argument in this way:

> "Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human

> life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum." (at pp. 82-83)

This language also supplies the short and conclusive answer to the suggestion in Judge Van Voorhis' dissenting opinion that the provisions of the 1945 ordinance in its original form were adequate protection and that, consequently, the requirements added by amendment were excessive (R. 206).[4]

On the question of appellants' rebuttal of the presumption of validity, the Trial Court correctly noted:

> ". . . the defendants have failed to sustain their burden of proof; in fact, little, if any evidence was adduced to show the unreasonableness of the provisions concerning the width of the beams, fences, depth requirement and the like" (R. 183).

The other testimony to which appellants point, patently did not either establish that the ordinance requirements were unreasonable, or that this pit was within the prescribed minimal safety limits.

The presumption of reasonableness, in the absence of sufficient rebuttal evidence, was conclusive.

Much of the argument made by appellants evolves out of an analysis which confuses the present ordinance with pure zoning ordinances like those involved in *People* v. *Miller, Matter of Harbison* and the other similar cases relied upon by appellants. The subject ordinance differs with these in regard to both effect and objective. As to

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[4] As we have already shown, this portion of Judge Van Voorhis' opinion was based upon the erroneous premise that appellants conformed with the ordinance before amendment.

effect, as has already been pointed out, Ordinance No. 16 is not a zoning ordinance prohibiting sand mining in the Town of Hempstead; it merely regulates that use. To argue, as do appellants, that it confines sand mining within certain minimum depths and that consequently it amounts to "prohibition" is an exercise in semantics and not helpful here. Every regulation necessarily prohibits to some degree (*Kentucky Whip & Collar Co.* v. *Illinois C. R. Co.*, 299 U. S. 334).

The distinction with regard to objectives is the larger and more significant one. Ordinances which are directed against threats to the public health and safety, as is Ordinance No. 16, are treated differently than ordinary zoning ordinances which have as their principal objectives aesthetics, building and land value and the maintenance of order and convenience. This second distinction is even more important than the first since an ordinance directed against a public nuisance may go so far as to prohibit absolutely such a use without requiring compensation. The law does not require the community to pay for protection against threats to its health or safety.

It is actually not necessary in this case to implement the latter distinction since, as appellee has shown, appellants have failed to prove an absolute prohibition and consequent substantial economic loss in the case at bar. These two ingredients constitute the substance of the "confiscation" argument as the appellants make it. Thus, it was necessary for appellants to clearly prove that their property has been permanently deprived of *any* profitable use (*Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222, 232). Additionally, in order to establish a loss, appellant had the burden of proving that there was left in the excavation sand and gravel that could be economically mined. Appellee has shown the gross failure of proof by appellants on these questions. Without clear proof this Court has no alternative but to sustain the presumption of validity;

the Court cannot interpolate evidence of confiscation into the record by assumption (*City of Yonkers* v. *Rentways, Inc.*, 304 N. Y. 499, 505).

Since appellants have failed to establish that the effect of enforcement of Ordinance No. 16 against them is a practical prohibition of use of the premises and that they have suffered a substantial economic loss as a result, the Court need not pass upon the reasonableness of the ordinance as applied to such a situation. However, even if appellants could have established that to be the fact, the case would not be governed by the authorities offered the Court by appellants. The pristine aim of the zoning ordinance in this country was an aesthetic one. Traditionally, this consideration has not been deemed sufficiently important to justify the total destruction of substantial interests. But from time immemorial the inherent power of a community to protect itself against uses which threaten the public safety has been recognized. Thus, there is no doubt that a use which the legislative body finds dangerous to health or safety can be prohibited by the municipality (see e.g. *Hadacheck* v. *Sebastian*, 239 U. S. 394; *Reinman* v. *City of Little Rock*, 237 U. S. 1; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498; *Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155; 41 Col. Law Review, 457, 459-467). The difference between zoning ordinances and ordinances like the subject one in this regard is constantly noted. The very law review authorities cited to the Appellate Division and to the Court of Appeals by appellants below serve as good examples (see e.g. 102 U. of Pa. Law Review 93, at 93-94, 102; 44 Corn. Law Quart. 450, 452, and see particularly 1951 Wis. Law Review 685, 692-695. See also 41 Col. Law Review, *supra*).

It is clear that pits like the subject one constitute the kind of dangerous use that may be eliminated (see *Town of Huntington* v. *Broad Hollow Estates, Inc.*; *Post Brick Co.* v. *Thompson*; *People* v. *Gerus*, all *supra*).

POINT II

The judgment in an earlier action on the appellee Town's zoning ordinance is not unconstitutionally impaired by the judgment below. The subject matter of the two actions and the rights they affect are totally different.

In substance the argument made under Point II of appellants' brief is identical with the argument made by appellants in all the courts below to the effect that the judgment in the 1956 action before Mr. Justice Hill was *res judicata* of the issues raised here. Whether stated as it was below or cast in constitutional terms as it is in this Court, the argument is equally vulnerable. The thrust of this contention is that once rights have been established by a judgment, those rights are deemed vested and cannot be impaired either by subsequent legislation or a second judgment.

The essential difficulty with the position of appellants on this score is the fact that the rights and duties affected in the instant action were never before Mr. Justice Hill in the 1956 case. The issues were basically different. The first action was brought by the Town of Hempstead to enjoin appellants from the operation of a use forbidden by the Town *zoning* ordinance. By its very nature it sought to prohibit appellants' excavation business on the subject property. It was not an action brought under Ordinance No. 16 which regulates such uses regardless of their geographical location (see Appendix to Appellants' Brief, Exs. 2 & 3).

The prior action resulted in a determination that the *zoning* ordinance was ineffective as against appellants' operation since their use had been in existence prior to adoption of that ordinance. The right established or declared in that action was the right to operate in a "B" residence zone despite the zoning ordinance. Since it was not an ac-

tion to enforce Ordinance No. 16 it obviously could not pass upon any alleged rights of the appellants with reference to that separate, regulatory ordinance of the Town.

Plainly, therefore, the question of whether or not the appellants have a non-conforming use with regard to the zoning ordinance is irrelevant to the inquiries to be made in this action. As has already been indicated in Point I of this brief, a non-conforming use, whether judicially declared or not, creates no immunity as against the operation of a regulatory ordinance like the one at bar.

Actually the question now before this Court has already been passed upon by the Supreme Court, Nassau County. In 1956, after the prior action referred to by appellants, the Town of Hempstead brought suit against the owners and operators of the pit for an injunction because of violations of the very ordinance here *sub judice* (Spec. Term, Part I, Sup. Ct., Nassau Co., Inc. #6447/56 (Defts.' Ex. E)). Appellants moved to dismiss the complaint in that action on essentially the same grounds they now urge in their Point II; they contended that the earlier decision of Mr. Justice Hill was *res judicata*. In deciding against appellants, the Court stated in an opinion by Mr. Justice Christ:

> "Some reliance is placed by the defendants upon the wording of one of the provisions in the judgment in that prior litigation. The clause in question provides in substance that the defendants have a prior non-conforming use in the conduct of a sand and gravel business which may be carried on upon the entire premises described in the complaint 'notwithstanding any ordinances of the plaintiff'. The defendants cannot rightfully contend that such language is sufficient to give immunity against any ordinances whatever of the Town of Hempstead. The judgment in the earlier action was rendered in litigation which was concerned only with the attempted enforcement of the zoning ordinance.
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> • • •

> The earlier litigation and the present lawsuit are identical so far as parties plaintiff and defendant are concerned. However, the issues determined in the earlier litigation are not the same as those raised by the present lawsuit. In the former litigation the basic issue which was tried and determined was the existence or non-existence of a non-conforming use under the zoning ordinance of the Town of Hempstead . . . The present suit is not concerned with the zoning ordinance at all."

After decision on this motion, the case was discontinued without prejudice.

This essential difference in the rights established by the two actions with which we are here concerned makes all the cases cited by appellants in Point II of their brief inapposite. Those cases hold simply that where rights have been established by a judgment, those precise rights are deemed vested and subject to all the traditional immunities and deference owed to vested rights. But obviously the only rights that can be said to vest are rights which the court granting the judgment was competent to affect. In essence it is the position of the appellants here that the judgment in the first case under the zoning ordinance established the right of the appellants to continue their operations at the premises regardless of any other ordinance that had been or might thereafter be adopted. The conclusion is a preposterous one. As Mr. Justice Christ and the courts below have held, the judgment in that first action spoke only with reference to the appellants' rights *vis-a-vis* the zoning ordinance. No other rights were in issue and no other rights could be "vested".

POINT III

The defense of *ex post facto* is inappropriate to this civil action. In any event, there is no present occasion to pass on the question. The ordinance does not amount to a bill of attainder.

In the Trial Court appellants raised the defense of *ex post facto* and it was there held that the defense had no application to this civil proceeding (R. 182). This finding was affirmed by the Appellate Division. In the Court of Appeals appellants' new counsel thought so little of the defense that they abandoned it—making no mention of it either in their briefs or upon oral argument. This notwithstanding, Judge Van Voorhis stated in his dissenting opinion that the criminal aspects of Ordinance No. 16 might be considered violative of the Constitution as an *ex post facto* law. He did not explain what relevance that conclusion might have to the case at bar. On the strength of its mention in the dissenting opinion below, appellants have resuscitated the argument here in their brief's final point, Point III.

The answer to appellants' contention can be a short one. There is a punitive or criminal aspect to the subject ordinance, but that aspect is confined to Section 10, entitled "Penalties". That section was not sought to be enforced by appellee in this action. This action is purely a civil one and in such an action the defense of *ex post facto* is inappropriate (*Bankers Trust Co.* v. *Blodgett*, 260 U. S. 647, 652; *Matter of L'Hommedieu* v. *Board of Regents*, 276 App. Div. 494, aff'd 301 N. Y. 476.) Moreover, the ordinance contains a "Separability" section which provides that if any part of the ordinance is declared invalid that declaration of invalidity shall not affect the remainder of the ordinance (Section 11, opp. p. 8 of R.) The penalty clauses, therefore, even if themselves unconstitutional, are severable and consequently there is no present occasion to pass upon their validity (*Ohio Tax Cases*, 232 U. S. 576, 594; *Phoenix Ry. Co.* v. *Geary, et al.*,

239 U. S. 277, 283; *Champlin Refining Co.* v. *Corporation Commission of Oklahoma, et al.*, 286 U. S. 210; *Sonzinsky* v. *United States*, 300 U. S. 506, 512; *People* v. *Lathrop*, 3 N. Y. 2d 551).

In their brief in this court, for the first time, the appellants make the argument that the application of Ordinance No. 16 to their pit amounted to a bill of attainder. This point was not raised in any of the courts below. Indeed, even Judge Van Voorhis, who discussed the *ex post facto* argument despite the fact that appellants themselves had abandoned it, did not mention bills of attainder. Appellants cite, as support for their contention, *Flemming* v. *Nestor* (363 U. S. 603), and make the point that the prohibition against bills of attainder is not necessarily limited to punishment consisting of the classic criminal sanctions of fine and imprisonment, but also includes punishment involving forfeiture of property rights. However true this may be, certainly the prohibition has not been expanded so as to embrace every situation where a duly adopted police regulation results in hardship to an individual. Indeed, the *Flemming* case itself makes that clear. In writing for a majority of the Court, which held that the legislation there involved did not constitute a bill of attainder, Mr. Justice Harlan pointed out that legislation directed to an activity rather than the individual involved in that activity, can in no case be considered a bill of attainder. The unlawful prohibition results only where the statute in question is evidently aimed at a specific person or class of persons (*Flemming* v. *Nestor, supra* at p. 614). (See also *DeVeau* v. *Braisted*, 363 U. S. 144, 160.) The subject ordinance plainly is directed not at individuals but at an activity, to wit, excavating, and results not in punishment but in regulation.

Concluding Comment

Many of the issues raised by appellants and necessarily discussed by appellee are peripheral ones. The ultimate question here is whether the challenged ordinance is rea-

sonably adapted to achieving the desired result. That it is reasonably adapted, is in the first instance presumed. A contrary conclusion can be reached only on the basis of substantial evidence clearly rebutting the presumption. There is no such rebuttal evidence here and consequently the presumption remains intact.

For the most part the argument by appellants in this Court, and in the Court of Appeals below, is an elaborate attempt to fill the gaps in their evidence by shifting the burden of proof to appellee or by simply altering the record—on occasion quite subtly—to suit their needs. The appellee submits that an examination of the record will reveal the insuperable deficiency in appellants' arguments and evidence and will lead this Court to the same conclusion reached by all the courts below.

In any event, this Court should consider the existence of the "Separability" provision contained in Ordinance No. 16 and earlier noted in this brief. If despite what appellee has pointed out in this brief, this Court should find any provision of the ordinance to be unreasonable, then the "Separability" provision should be implemented to save the substance of the ordinance.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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